IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

VANN J. BRANCH and EILEEN M. BRANCH — PLAINTIFFS

V. — NO. 2:00CV137-B-B

GENERAL ACCIDENT INSURANCE — DEFENDANT/THIRD-PARTY PLAINTIFF

V.

ROGER S. BANFIELD — THIRD-PARTY DEFENDANT

MEMORANDUM OPINION

This cause comes before the court on the plaintiffs' motion for ruling on a matter of law, construed as a motion for partial summary judgment. The court has duly considered the parties' memoranda[1] and the defendant's exhibit and is ready to rule.

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the nonmoving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the nonmovant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, designate 'specific facts showing that there is a genuine issue for trial."' Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be drawn in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L.

[1]The plaintiffs did not submit a rebuttal.

Ed. 2d 202, 216 (1986); Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the nonmovant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986); Fed. Sav. & Loan Ins. v. Kralj, 968 F.2d 500, 503 (5th Cir. 1992).

The plaintiffs brought this action in state court[2] to recover uninsured motorist insurance proceeds under a policy issued by General Accident Insurance Company [General Accident] for personal injuries arising out of an automobile accident allegedly caused by an uninsured motorist. General Accident filed a third-party complaint against Roger Banfield, identified in the complaint as the uninsured motorist who proximately caused the subject accident, for a judgment against Banfield in the amount of insurance proceeds, if any, it is required to pay the plaintiff .

The instant motion seeks an adjudication that the allegedly negligent motorist is uninsured for purposes of uninsured motorist coverage. The plaintiffs assert that General Accident has diligently attempted to serve Banfield but has not located him. The plaintiffs contend that since his whereabouts are unknown Banfield should be deemed uninsured within the purview of Miss. Code Ann. § 83-11-103(c)(v) (defining an uninsured motor vehicle as "[a] motor vehicle of which the owner or operator is unknown"). General Accident asserts that it has learned Banfield's current residential address but has been unable to serve him. The terms "unknown" and "unidentified" have been used interchangeably in the context of § 83-11-103(c)(v). *Massachusetts Bay Ins. Co. v. Joyner*, 763 So. 2d 877, 879 (Miss. 2000). Banfield is named in the complaint. *See id.* at 881 (construing a case in

[2]Defendant General Accident Insurance Company removed this cause on the ground of diversity jurisdiction.

which "the operator of the vehicle was not 'unknown' as is required by the statute, the operator was in fact named in the opinion"). In addition, Banfield's identity, residential address, automobile insurer and insurance policy number were known at the time of the subject accident, as reflected in the accident report. The court finds that clearly Banfield is not an unknown vehicle owner or operator within the purview of the Mississippi uninsured motorist [UM] statute. Therefore, § 83-11-103(c)(v) is not applicable.

The purpose of the UM statute is "to compensate victims who are injured as a result of the actions of motorists who have no insurance available to compensate them." *Massachusetts Bay Ins. Co.*, 763 So.2d at 879. The plaintiffs have the burden to prove that Banfield was the owner or operator of an uninsured motor vehicle. *United Services Auto. Ass'n v. Shell*, 698 So.2d 96, 98 (Miss. 1997). The plaintiffs must, at least, make "a reasonable effort to determine the existence or not of liability insurance." *State Farm Fire & Cas. Co. v. Magee*, 368 So.2d 230, 232 (Miss. 1979). The plaintiffs merely state: "[I]t is believed that the limits of Banfield are much less than the limits for Plaintiffs." The plaintiffs have made no effort to investigate whether Banfield was an owner or operator of an "uninsured motor vehicle" as defined in § 83-11-103(c)(iii):

> An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage

For the foregoing reasons, the court finds that the plaintiffs have failed to present any evidence showing that Banfield was an uninsured motorist at the time of the subject accident. Since there are genuine issues of material fact as to the availability and amount of liability coverage under Banfield's insurance policy, the instant motion should be denied.

An order will be issued accordingly.

THIS, the _____ day of May, 2001.

NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE